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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

IN RE: RISK MANAGERS INTERNATIONAL, INC.; HERSCHEL HANCOCK, Individually and as Officer of RISK MANAGERS INTERNATIONAL, INC.; and CORPORATE UNDERWRITERS, LTD.,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO THE HONORABLE JOHN K. DIETZ, PRESIDING JUDGE OF THE 250TH JUDICIAL DISTRICT COURT OF TRAVIS COUNTY, TEXAS

DAN MORALES
Attorney General of Texas
WILL PRYOR
First Assistant Attorney General
MARY F. KELLER
Deputy Attorney General
for Litigation
EDNA RAMÓN BUTTS
Assistant Attorney General
Chief, Finance Division

DIANE BARLOW-SPARKMAN
Assistant Attorney General

LINDA I. SHAUNESSY
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2018
(512) 477-2348 - Telecopier
COUNSEL OF RECORD

February 3, 1993

Attorneys for State of Texas
and State Board of Insurance

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO THE HONORABLE JOHN K. DIETZ, PRESIDING JUDGE OF THE 250TH JUDICIAL DISTRICT COURT OF TRAVIS COUNTY, TEXAS

STATEMENT OF THE CASE

Petitioners' statement of the case contains numerous inaccuracies and omits several important facts. Therefore, the State of Texas ("State") provides the following statement of the case.

Corporate Underwriters, Ltd. ("Corporate Underwriters") is an off-shore insurance company incorporated in the Turks and Caicos Islands in the British West Indies. Corporate Underwriters sells insurance to Texas residents which covers risks located and resident in Texas. Corporate Underwriters is not licensed to sell insurance in Texas. Corporate Underwriters claims that it is exempt from any licensing requirements in Texas because it is selling insurance in Texas on an "independently procured" basis. Texas law requires that

to comply with the independently procured exemption, all negotiations for the procurement of such insurance must occur outside of Texas, the transaction must be reported to the State, and a premium tax must be paid to the State. Tex. Ins. Code Ann. art. 1.14-1 §2(b)(4) (Vernon Supp. 1993) ("Insurance Code").

Risk Managers International, Inc. ("RMI") is a Texas corporation which administers claims for Corporate Underwriters. RMI has its offices in Dallas. RMI is not licensed to sell insurance and is not licensed as a third-party administrator. Herschel Hancock is the president of RMI. Hancock is not licensed to sell insurance in Texas and is not licensed as a third-party administrator.[1]

In the late 1980's, the State became aware that Petitioners were engaged in certain insurance activity in Texas. The State's investigation into Petitioners' activities revealed that the negotiations between Corporate Underwriters and its prospective insureds do not

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[1] Although Petitioners claim that Corporate Underwriters conducts its insurance business from offices in the Turks and Caicos, Corporate Underwriters receives mail and premium check's at RMI's office in Dallas. Corporate Underwriters maintains a bank account in Dallas and Hancock has signatory authority on such account. At Hancock's direction, funds from the account are used to pay commissions to insurance agents and consultants in Texas who bring business to Corporate Underwriters. [Appendix L-27]

take place entirely outside the State of Texas and that therefore, Corporate Underwriters is not selling insurance in Texas on an independently procured basis. In furtherance of its investigation, the State subpoenaed Hancock to appear for deposition and produce certain documents related to the activities of Corporate Underwriters and RMI in Texas. Hancock asserted the Fifth Amendment privilege against self-incrimination and refused to testify or produce the documents. The State moved to compel Hancock's response and the State district court entered an order compelling Hancock to respond to the subpoena. Hancock appealed the district court order, but failed to obtain relief. *Hancock v. State of Texas*, 800 S.W.2d 683 (Tex. App. - Austin 1990, writ denied).

During the pendency of Hancock's appeal, the State uncovered additional evidence that Petitioners were unlawfully selling insurance in Texas. Petitioners' activities were particularly troubling to State regulators because Petitioners were purporting to sell workers' compensation insurance to numerous employee leasing firms throughout Texas.[2] These employee leasing firms "employ"

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[2] Petitioners have attempted to create a distinction between "statutory" workers' compensation insurance and workers'

thousands of workers, usually in fields where there is a high risk of on-the-job injury. If Corporate Underwriters does not have adequate reserves to cover the claims that are bound to arise under such policies or if Corporate Underwriters is misappropriating premiums, the workers who are the beneficiaries of such policies will be without meaningful coverage. Under these circumstances, the State would have been remiss if it had not taken action against the Petitioners.

Thus, on September 8, 1989, the State filed its complaint against Petitioners seeking to enjoin them from doing the unauthorized business of insurance in Texas and seeking imposition of fines and penalties for conducting the business of insurance in Texas without a license in violation of Insurance Code art 1.14-1. The State also applied for the *ex parte* appointment of a temporary receiver. Pursuant to the State's request, a temporary receiver was appointed for Corporate Underwriters and RMI. Petitioners

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compensation insurance used in a generic sense. In Texas, if an employer elects to subscribe to the workers' compensation system, that employer must purchase workers' compensation insurance from an insurance company specifically licensed to sell workers' compensation insurance. Tex. Rev. Civ. Stat. Ann. art. 8308-3.23(a) (Vernon 1992). Corporate Underwriters maintains that it is selling generic workers' compensation insurance which is outside the workers' compensation system.

characterize the temporary receivership, which was in effect for seven days, as illegal and improper and accuse the State of numerous wrongdoings during the receivership. [Appendix L-19] Petitioners argue that these alleged wrongdoings should bar the State from obtaining the discovery it now requests. Petitioners have been entirely unsuccessful, however, in establishing any of their allegations. For instance, Petitioners have failed to establish that the State seized any of Hancock's personal files during the temporary receivership. [Appendix L-35, L-59]. Petitioners have also failed to establish that the State intimidated any RMI employees or conducted unlawful searches of RMI or its employees.[3] Finally, Petitioners have never established that the State made any false statements to third parties concerning Petitioners.[4]

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[3]Petitioners' witness on these points testified that the State asked RMI employees for the keys to RMI's file cabinets and used the keys to obtain access to the cabinets. Further, Petitioners' witness testified that the State asked permission to search employee handbags, but did not search the handbag of any employee who denied permission for the search. The witness offered no evidence that the State threatened her or any other RMI employee. [Appendix L-23, L-35].

[4]In their allegations, Petitioners are evidently referring to the article which appeared in the March 19, 1991 edition of *The Wall Street Journal*. The article explores the havoc wreaked by cut rate employee leasing companies and the off-shore, unregulated insurance companies that provide them with what is purported to be workers'

On September 25, 1989, the state district court, after hearing evidence and the argument of counsel, issued a temporary injunction order enjoining Petitioners from doing the business of insurance in Texas. The court specifically found that Petitioners had not complied with the independently procured exemption and were engaged in the unauthorized business of insurance in Texas. The court dissolved the temporary receivership on the basis that the State had not produced any evidence of insolvency. Petitioners filed an interlocutory appeal of the trial court's temporary injunction order. The Court of Appeals, Third Judicial District of Texas, Austin, Texas, in a written opinion, affirmed the trial court's ruling. [Appendix B-1] The Texas Supreme Court dismissed Petitioners' appeal for want of jurisdiction.

During the course of Petitioners' appeals of the temporary injunction order, the State's efforts to obtain discovery from Petitioners were stayed. When the appeals were resolved in favor of the State, the State served Petitioners with its discovery requests. In response, RMI produced limited responses, but moved for a

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compensation insurance. One of the State's attorneys was interviewed for the article, but there has never been any showing that the State made any false or inaccurate statements in connection with the interview or that the article contains any inaccuracies.

protective order with respect to a majority of the requests alleging that it has a privacy right which exempts it from having to respond. Corporate Underwriters repeated the privacy arguments asserted by RMI and further objected to every discovery request and moved for a protective order on the basis of the Turks and Caicos nondisclosure laws.[5]

On March 10, 1992, the trial court heard arguments and testimony on the motions for protective order filed by RMI and Corporate Underwriters. The trial court ordered RMI to respond to the discovery in dispute and in a ruling from the bench, ordered Corporate Underwriters to submit its responses to the court for an *in camera* inspection. [Appendix H-1 and Petitioners' Appendix C-1-1] On April 13, 1992, the trial court heard Petitioners' arguments for reconsideration and denied the motions for reconsideration. On June 8, 1992, the trial court heard Petitioners' second motion for reconsideration. Once again, the trial court denied Petitioners the relief they requested. Thereafter, Petitioners presented their Motion

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[5] Hancock made the same privacy objections and also asserted the Fifth Amendment in response to the State's discovery requests. In a later ruling, the trial court sustained some, but not all, of Hancock's Fifth Amendment objections.

for Leave to File Petition for Writ of Mandamus and for Immediate Temporary Relief to the Court of Appeals, Third Judicial District of Texas. The Court of Appeals denied Petitioners' motion on July 1, 1992. [Petitioner's Appendix A-1-1] Petitioners then presented their Motion for Leave to File Petition for Writ of Mandamus and for Immediate Temporary Relief to the Supreme Court of Texas. The Supreme Court of Texas denied this motion on September 16, 1992. [Petitioners' Appendix A-2-1]

REASONS FOR DENYING THE REQUEST FOR WRIT OF MANDAMUS

Petitioners make two arguments in support of their request that this Court issue a writ of mandamus compelling the trial court judge to vacate his discovery orders. First, Petitioners argue that they have a constitutional right to privacy which extends to the discovery sought by the State in this civil litigation. Petitioners claim that this privacy right exempts them from having to respond to the State's discovery requests. Second, Petitioners contend that Corporate Underwriters, which is subject to the jurisdiction of the Texas courts, is exempt from responding to the State's discovery requests because the laws of the Turks and Caicos allegedly prohibit disclosure of such information.

As demonstrated below, Petitioners' arguments must fail. First, the Fourth Amendment rights of a corporation are not violated when the requested discovery is relevant and reasonable. Here, the trial court ruled that the requested discovery was relevant and not overbroad, so there has been no infringement of Petitioners' Fourth Amendment rights. Finally, it is well-established that a court in this country is empowered to order discovery when it has personal jurisdiction over a foreign party, despite the existence of foreign nondisclosure laws. The trial court did not abuse its discretion when it ordered Corporate Underwriters to produce its discovery for an *in camera* inspection, so that it could weigh the respective interests of the parties and determine whether any of the discovery should be propounded to the State.

I.

THE TRIAL COURT ORDERS DO NOT INFRINGE ON PETITIONERS' CONSTITUTIONAL PRIVACY RIGHTS

Petitioners' assertions that the discovery ordered by the trial court would deprive them of their Fourth Amendment rights are incorrect and in direct opposition to prior rulings of this Court.

A. SINCE 1911 THIS COURT HAS HELD THAT CORPORATE DOCUMENTS AND FINANCIAL

INFORMATION ARE NOT AFFORDED ABSOLUTE PROTECTION UNDER THE FOURTH AMENDMENT

Petitioners fail to acknowledge this Court's decisions on the questions of whether financial information and corporate records may be compelled from a corporation and whether production of corporate documents is violative of a corporation's Fourth Amendment rights. This Court first addressed these issues in 1911 in *Wilson v. United States*, 221 U.S. 361 (1911). There, this Court reviewed a decision holding a corporate officer in contempt for refusing to produce the corporate books pursuant to grand jury subpoena. This Court found that the production of such documents did not violate the provisions of the Fourth Amendment. This Court stated:

> [B]ut the corporate form of business activity with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, *the corporation has no privilege to refuse*....Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, *it must*

> *submit its books and papers to duly constituted authority when demand is suitably made.*

Wilson 221 U.S. 361, 382 (1911) (emphasis added).

This Court has consistently and continually followed *Wilson*, finding no infringement of Fourth Amendment rights when corporate records are properly subpoenaed or ordered to be produced. *See, American Lithographic v. Werckmeister*, 221 U.S. 603 (1911); *Wheeler v. United States*, 226 U.S. 478 (1913); *Grant v. United States*, 227 U.S. 74 (1913); *Essgee Co. of China v. United States*, 262 U.S. 151 (1923); *United States v. White*, 322 U.S. 694 (1944); and *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

In sum, the corporate records at issue are not absolutely protected by the Fourth Amendment from court ordered disclosure.

B. GOVERNMENTAL ENTITIES MAY OBTAIN CORPORATE RECORDS

Corporations are not permitted to engage in commerce free from regulatory scrutiny or in secret. *California Bankers Ass'n. v. Shultz*, 416 U.S. 21 (1974). In the present case, the trial and appellate courts have concluded that RMI and Corporate Underwriters have conducted the business of insurance in Texas. [Appendix B-1] As

entities who enjoy the benefits of selling insurance products in Texas, Corporate Underwriters and RMI must comply with the insurance regulations instituted by Texas.[6]

Subpoenas or orders sanctioned by a court seeking production of corporate records do not violate the Fourth Amendment if the requests comply with a four prong test: 1) the requests are not too indefinite or broad; 2) the demanding agency is authorized by law to make such an inquiry; 3) the inquiry seeks relevant materials; and 4) the disclosure is not unreasonable. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946). The State's discovery requests satisfy all four prongs of the test.

The discovery requested is relevant and material to the question of whether RMI and Corporate Underwriters have conducted the unauthorized business of insurance in Texas. The State has demonstrated that the discovery requests are reasonable because each of the requests relate to documents which will prove that RMI or Corporate Underwriters violated article 1.14-1 of the Insurance Code,

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[6] See McCarran Ferguson Act, 59 Stat. 33, 15 U.S.C. §1011 (Insurance regulation is governed by the State); *United States v. Morton Salt Co.*, 338 U.S. 632, 652-3 (1950).

or will provide information relating to the assessment of premium taxes and civil penalties under article 1.14-1.

In addition, records which an entity is required by law to maintain in its possession for inspection by or disclosure to a governmental entity are not subject to Fourth Amendment protection. *California Bankers Ass'n. v. Shultz*, 416 U.S. 21 (1974). This Court reasoned that artificial entities may be subject to enhanced regulations and regulatory requirements as a result of the privileges the entities derive from engaging in interstate commerce.

Further, this Court has ruled that an entity must comply with a request for information from a regulatory agency. In *United States v. Morton*, 338 U.S. 632, 652 (1950) this Court stated "that law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law."

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING DISCOVERY OF PETITIONERS' CORPORATE DOCUMENTS AND FINANCIAL INFORMATION

Petitioners urge this Court to prohibit the discovery ordered by the trial court. As discussed the discovery is not violative of the U.S. Constitution. Moreover, the discovery requests are within the

scope of discovery as allowed by the Texas Rules of Civil Procedure. Therefore, this Court should not disturb the trial court's orders.

A. THE SCOPE OF DISCOVERY IS BROAD IN TEXAS

Texas Rule of Civil Procedure 166(b) (patterned after Fed. Rule Civ. Proc. 26(b)(1)) states that:

> Parties may obtain discovery regarding any matter which is relevant to the subject matter in the pending action whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[7]

The discovery orders entered by the trial court compel RMI to answer interrogatories or produce the documents relating to the following areas of inquiry:

(a) money paid or owed relating to insurance solicited for risks resident, located or to be performed in Texas;
(b) receipt of money from the sale of insurance;
(c) payment of claims;
(d) payment of expenses, commissions, fees, taxes, relating to insurance sold covering a risk in Texas;

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[7] The relevant portions of Tex. Rule Civ. Proc. 166 (b) are included herein as Appendix A-1 .

(e) correspondence related to the marketing of insurance where the risk is located in Texas;
(f) disbursements or wire transfers between RMI and Corporate Underwriters regarding the solicitation or procurement of insurance;
(g) payment of salaries, expenses, or compensation to RMI or Corporate Underwriters;
(h) premium dollars paid to RMI and/or Corporate Underwriters;
(i) capital, reserve, or assets available for the payment of claims for insurance;
(j) consultant fees;
(k) money paid for solicitation of insurance; and
(l) compensation paid to Hancock, and or RMI.

[Petitioners' Appendix C-1-1, C-2-1 and Appendix K-1, M-1]

These areas of inquiry are necessary and material to the case at bar and are within the proper scope of discovery.

B. TEXAS COURTS ALLOW THE DISCOVERY OF FINANCIAL INFORMATION AND NET WORTH

Net worth is discoverable in this case because the State seeks civil penalties. The Texas Supreme Court has held that net worth, including financial statements, is discoverable in a suit in which punitive damages may be recovered. *Lunsford v. Morris*, 746 S.W.2d

471 (Tex. 1988)(orig. proc.); *Hanna v. Meurer*, 769 S.W.2d 680, 681 (Tex. App. - Austin, 1989), (orig. proc.) (*en banc, per curiam*). Net worth is discoverable because the purpose of punitive damages is to punish the defendant. As a result, the defendant's ability to pay damages is relevant so that damages may be properly assessed. *Lunsford* at 473. In order to punish the Petitioners for their illegal activities, the State seeks assessment of civil penalties in the statutory amount of up to ten thousand dollars per day per violation of the Insurance Code.[8] Civil penalties, like punitive damages, are awarded to punish and set an example for others. Thus, net worth is relevant to assessing civil penalties.

The Court of Appeals, Fifth Judicial District of Texas, has concluded that evidence of the amount of profit a defendant has obtained by violating a statute might be admissible evidence when assessing civil penalties. *Lloyd A. Fry Roofing Co. v. State*, 524 S.W.2d 313, 322 (Tex. App. - Dallas 1975, writ ref'd n.r.e.). Contrary to Petitioners' representations, *Fry Roofing* stands for the proposition that courts should assess civil penalties based on the

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[8] Specifically, the State seeks penalties pursuant to Tex. Ins. Code Ann. arts. 1.14-1, §3(d) and 21.21, §15(c) (Vernon 1993). [Petitioner's Appendix B-5-3, B-5-6]

nature and gravity of the violation. If evidence of the amount of profit a defendant made from illegal activities may be admitted into evidence in a case involving assessment of civil penalties, then evidence of net worth should be discoverable in the same suit.[9]

C. THE DISCOVERY SOUGHT BY THE STATE IS NECESSARY TO CALCULATE PREMIUM TAXES

All categories of information requested of Petitioners are needed to calculate unauthorized insurance premium taxes owed under Insurance Code article 1.14-1, §11. The State has sued for nonpayment of unauthorized insurance premium taxes under this article. The Insurance Code provides that an unauthorized insurance company must pay the State an unauthorized insurance premium tax of 4.85% of the amount of gross premiums *actually received* during a calendar year, not the amount of premiums which were *charged* as

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[9] Under Texas case law, obtaining discovery regarding financial information or net worth for a period of 10 years before trial is allowable. *Delgado v. Kitzman*, 793 S.W. 2d 332 (Tex. App. - Houston [1st Dist.] 1990), (orig. proc.) Relator RMI was incorporated in 1984, and discovery is requested from January 1, 1985.

the Petitioners have erroneously asserted.[10] In order to accurately calculate the premium taxes, the State must know: (1) the exact amount of premiums which the Petitioners actually received; (2) what premiums were paid for insurance risks located in Texas (as opposed to insurance risks located outside of the state); (3) what premium taxes, if any, have been reported to other states; and (4) when the insurance premiums were received by the Petitioner(s). [Appendix L-67] The date the premiums are *received* is critical to a determination of the amount of late payment penalties that should be assessed under the statute, due to varying rates of interest and various tax rates under the Insurance Code. Further, the State needs to know the amount of money paid by an insurer to any person acting as an agent, which is not included in the calculation of premium taxes and must be separated from the actual premium payment. Therefore, documentation demonstrating the amount of premium dollars which were used to pay agent's commissions is necessary.

Petitioners erroneously allege that they have previously produced documents which show the amount of premiums paid for

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[10] Under Tex. Ins. Code Ann. art. 1.14-1 § 11 (Vernon 1993) the term "premium" includes all premiums, membership fees, assessments, dues, and any other consideration for insurance.

each policy. Petitioners have produced certain insurance policies which demonstrate the *estimated policy premium* which might be charged under the policy. However, Petitioners have failed to produce any documents that indicate: (1) the amount of premiums which were *actually received* by Corporate Underwriters; (2) premiums paid for insurance risks located in *Texas*; (3) the amount, if any, of premium taxes which have been reported or paid to any other state(s); and (4) the date and calendar year in which the premiums were actually received. The State demonstrated through testimony of its chief witness that to accurately determine the amount of premium taxes owed, the State needs responses to the discovery it propounded to Petitioners.[11] [Appendix L-70]

D. THE DISCOVERY SOUGHT FROM INDIVIDUAL PETITIONER HERSCHEL HANCOCK IS WITHIN THE PROPER SCOPE OF DISCOVERY

Subsequent to the entry of the discovery orders which are the subject of Petitioners' request to this Court, the trial court heard Hancock's objections based on his alleged Fifth Amendment rights.

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[11] Petitioners also erroneously allege that the premium tax information is readily available from filings made with the Texas Comptroller's Office. Such filings do not exist and are not evident in the record.

Many of Hancock' Fifth Amendment objections were sustained. [Appendix K-1] As a result, Hancock has been ordered to provide the following information to the trial court for an *in camera* inspection: (1) Hancock's social security number; (2) Hancock's residential addresses; (3) the identity of Hancock's accountants; (4) Hancock's net worth; and (5) information regarding compensation received by Hancock from RMI and Corporate Underwriters. These areas of inquiry contain no privilege which would prevent their *in camera* inspection by the trial court. Thus, the trial court has not abused its discretion.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING CORPORATE UNDERWRITERS TO PRODUCE ITS DISCOVERY RESPONSES FOR *IN CAMERA* INSPECTION

Corporate Underwriters further objects to the discovery requests propounded by the State on the basis of the Turks and Caicos nondisclosure laws. Corporate Underwriters alleges that if it is compelled to produce the information sought by the State, it will be subject to criminal prosecution in the Turks and Caicos. First, it should be made clear that the trial court did not order Corporate

Underwriters to produce any discovery to the State. Instead, the trial court merely ordered Corporate Underwriters to produce its responses and responsive documents to the court for an *in camera* inspection. [Appendix M-1] To the extent that Corporate Underwriters' responses are duplicative of the responses by RMI, the trial court held that Corporate Underwriters is not obligated to produce such information. [Appendix H- 11] Corporate Underwriters has refused to tender its discovery responses for the *in camera* inspection.

A. THE TRIAL COURT HAS THE POWER TO ORDER PRODUCTION OF THE DISCOVERY SOUGHT BY THE STATE

The case law is unmistakably clear that when a United States Court has jurisdiction over a party which has control of documents or other information, that court has the power to order production of the discovery, despite the location of the documents and the existence of any foreign laws which may impose penalties for their disclosure. *Societe Internationale v. Rogers*, 357 U.S. 197, 204-206 (1958).; *See also, Societe Nationale v. U.S. District Court*, 482 U.S. 522, 544 n.29 (1987); *United States v. First Nat'l. Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); *In re: Grand Jury Proceedings*, 532 F.2d 404, 407 (5th Cir. 1976); *United States v. First National City Bank*,

396 F.2d 897, 901 (2d Cir. 1968); and *In re: Uranium Antitrust Litigation (Westinghouse Electric Corp v. Rio Algom Ltd.)*, 480 F.Supp. 1138, 1145 (N.D. Ill. 1979).

It is undisputed that the trial court has jurisdiction over Corporate Underwriters. Further, Corporate Underwriters does not dispute that it has control of documents responsive to the State's discovery requests. Thus, the trial court has the power to compel Corporate Underwriters to respond to the State's discovery requests.

B. IT IS WITHIN THE DISCRETION OF THE TRIAL COURT TO ORDER THE DISCOVERY REQUESTED BY THE STATE.

While the existence of a foreign nondisclosure law does not prevent a United States court from ordering discovery, the trial court is instructed to use its discretion in determining whether to exercise such power. The Restatement (Third) on Foreign Relations Law (American Law Institute 1991 at § 442), identifies five factors to be weighed by a court in determining whether to exercise its power to compel production in the face of a foreign statute that blocks discovery. Those five factors are: (1) the importance of the documents to the litigation; (2) the degree of specificity of the requests; (3) whether the information originated in the United States;

(4) the availability of alternative means of securing the information; and (5) the extent to which non-compliance with the discovery requests would undermine important interests of the state or compliance with the request would undermine an important interest in the country where the information is located. In its brief to the trial court, the State addressed each of these elements in detail. In its ruling, the trial court concluded that it would review the discovery responses *in camera*, weigh the respective interests of each party and thereafter determine what documents or responses, if any, should be disclosed to the State. [Appendix H-12] Clearly, there has been no abuse of discretion since the trial court has not yet ruled that any of Corporate Underwriters' responses are discoverable. In any event, the State has made an adequate showing that the discovery should be ordered.

1. The Discovery Sought Is Important To The Litigation.

In its requests to Corporate Underwriters, the State seeks discovery of information regarding the solicitation, sale and delivery of insurance policies issued to Texas residents by Corporate Underwriters, premiums paid to Corporate Underwriters by Texas residents, claims made by Texas residents under the policies issued

by Corporate Underwriters, evidence of Corporate Underwriters' net worth or financial condition, and the manner in which Corporate Underwriters provides for the payment of claims as they arise. This discovery, as demonstrated in the preceding sections of this brief, is relevant and important to this litigation.

2. The State's Discovery Requests Are Sufficiently Specific. To the extent Petitioners have objected to the State's discovery requests for lack of specificity, such objections have been disposed of by the trial court in a prior ruling. Petitioners do not seek relief with respect to this prior ruling.

3. Much Of The Information Originated In The United States. The information requested by the State relates to Corporate Underwriters' insurance activities in Texas. The information requested by the State either originated in Texas or is directly related to Corporate Underwriters' business in Texas.

4. There Are No Alternative Means To Secure The Information. The trial court has ruled that Corporate Underwriters is not obligated to produce information for the *in camera* inspection that would be duplicative of the information supplied by RMI. [Appendix H-1] There are no other sources for the information.

5. Noncompliance With The Discovery Requests Would Undermine Important Interests Of Texas. The State has a strong interest in regulating insurance. Under the McCarran-Ferguson Act, Congress has conferred upon the states the ability to regulate insurance, declaring such regulation to be in the public interest. Section 1 of the Act, 59 Stat. 33, 15 U.S.C. §1011; *W & S Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648 (1981); *Osborn v. Ozlin*, 310 U.S. 53 (1940) (holding that a state has a legitimate interest in all insurance policies protecting its residents, an interest which the state can protect even though the state action may have repercussion beyond state lines). This exercise of the State's regulatory powers can only be effectuated by allowing the State to conduct discovery to obtain evidence necessary for a complete and thorough investigation of unauthorized insurance activities. Corporate Underwriters, on the other hand, has not provided any justification of the Turks and Caicos nondisclosure laws or made any attempt to demonstrate how the interests of the Turks and Caicos could possibly outweigh the interest of the State.[12]

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[12] Corporate Underwriters states that the Turks and Caicos government extensively regulates all insurance companies incorporated in the Turks and Caicos. The State does not concur with

C. CORPORATE UNDERWRITERS HAS THE BURDEN OF PROOF IN ASSERTING THE EXEMPTION FROM DISCOVERY AND HAS FAILED TO MEET THIS BURDEN.

Under Texas law, Corporate Underwriters, as the party seeking to limit discovery by asserting a privilege or exemption from discovery, has the burden of proof. *Weisel Enterprises, Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (orig. proc.) (*per curiam*) (*citing Jordan v. Court of Appeals for Fourth Supreme Judicial District*, 701 S.W.2d 644, 648-649 (Tex. 1985) (orig. proc.). The fact that Corporate Underwriters is asserting an exemption from discovery based on the Turks and Caicos nondisclosure laws does not alter this rule.

Petitioners contend that *McKesson Corp. v. Islamic Republic of Iran*, 138 F.R.D. 1 (D.D.C. 1991) suggests that the burden of

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this statement and would point out that all such regulation is done on a "confidential" basis which prohibits third parties from access to any of the information obtained by the Turks and Caicos authorities. Further, the Turks and Caicos authorities have refused to issue Corporate Underwriters a license to sell insurance in the Turks and Caicos. The "authority" granted to Corporate Underwriters by the Turks and Caicos government prohibits Corporate Underwriters from offering its insurance product to Turks and Caicos residents. In any event, the extent to which Corporate Underwriters is regulated in the Turks and Caicos is not relevant. Since Corporate Underwriters is conducting its insurance business in Texas, it is subject to regulation by the Texas authorities.

proof shifts to the State because a foreign blocking statute is at issue. *McKesson* does not stand for any such proposition. The holding in *McKesson* is limited to a very specific fact situation which is not applicable here. *McKesson* involved a suit against the country of Iran and application of the Foreign Sovereign Immunity Act ("FSIA"). In that case, the court found that before subject matter jurisdiction would lie under FSIA, the court had to find that a principal-agency relationship existed between Iran and the instrumentality that allegedly committed the wrong. Under FSIA, there is a presumption that an instrumentality is separate from the foreign sovereign. Thus, the plaintiff seeking discovery was allowed to take limited discovery with respect to the FSIA jurisdiction issue, but was directed to "avoid frustrating the significance and benefit of [Iran's] immunity to suit." *McKesson* at p. 3. None of the facts in *McKesson* are present here.

Corporate Underwriters has failed to meet its burden of proof in establishing an exemption from discovery.

D. THERE IS NO PUBLIC POLICY REASON TO EXEMPT CORPORATE UNDERWRITERS FROM DISCOVERY.

Corporate Underwriters complains that it faces a Hobson's Choice: violate the Turks and Caicos nondisclosure laws and be

subject to possible criminal penalties in the Turks and Caicos or violate Texas discovery rules and be subject to sanction in the pending litigation. Corporate Underwriter's dilemma is self imposed. Corporate Underwriters purposely availed itself of the Texas market for insurance and chose to do business in Texas. Corporate Underwriters must now abide by the rules of the Texas courts. If doing business in the State of Texas and abiding by the laws of the State of Texas subjects Corporate Underwriters to criminal penalties in the Turks and Caicos, perhaps Corporate Underwriters should consider limiting its business to the Turks and Caicos or incorporating in a different jurisdiction.

There is no evidence that the trial court abused its discretion in ordering the *in camera* inspection of Corporate Underwriters' responses to the State's discovery requests. Accordingly, Petitioners' Petition should be denied.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Petitioners' Petition for Writ of Mandamus be denied and that this Court grant the State such other relief as provided at law or in equity.

Dated: February 3, 1993
Austin, Texas

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant
Attorney General

MARY F. KELLER
Deputy Attorney General
for Litigation

EDNA RAMON BUTTS
Assistant Attorney General
Chief, Finance Division

DIANE BARLOW-SPARKMAN
Assistant Attorney General

LINDA IBACH SHAUNESSY
Assistant Attorney General
Finance Division
State Bar No. 01758557
P. O. Box 12548
Austin, Texas 78711
(512) 463-2018
(512) 477-2348 - Telecopier
COUNSEL OF RECORD

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